STATE OF MICHIGAN

COURT OF APPEALS

DONNA CHARTRAND,

Plaintiff-Appellant,

v

JERRY J. BRUECK and SUSAN BRUECK,

Defendants-Appellees.

UNPUBLISHED
January 29, 2002

No. 225886
Muskegon Circuit Court
LC No. 98-038822-CH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiff, a back-lot owner in a lakeside subdivision, sued to establish her right to maintain a dock on the dedicated shore strip of the subdivision. Plaintiff claimed that the plat dedication gave her the right to place a dock off the shore strip and also claimed the right to maintain the dock either by a prescriptive easement or through adverse possession. Defendants own the lot fronting on the shore strip where plaintiff's dock was located; they removed the dock when it fell into disrepair. After a bench trial, the trial court found that plaintiff had no cause of action on any of the theories she advanced. Plaintiff appeals by right. We reverse and remand.

A trial court's findings of fact will not be reversed unless they are clearly erroneous. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000); *Gumma v D & T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999); MCR 2.613(C). A finding of fact is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake occurred. *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 133; 506 NW2d 556 (1993), remanded on other grounds 443 Mich 882 (1993). A trial court's conclusions of law, however, are reviewed de novo on appeal. *Gumma, supra* at 221*; Frericks v Highland Twp*, 228 Mich App 575, 583, 579 NW2d 441 (1998).

The plat instrument here stated that "the streets and alleys as shown on said plat are hereby dedicated to the use of the public and the shore between lots and the lake to lot owners only." The trial court, citing *Thies v Holland*, 424 Mich 282, 293; 380 NW2d 463 (1985), concluded that this dedication did not transfer a fee interest in the shore strip to the back-lot owners. The court further concluded that the back-lot owners had no right to construct docks along the shore strip, noting that "[a]ny other interpretation would quickly result in chaos, as the

400 or so property owners each would scramble for their little piece of the shoreline strip." In light of *Thies, supra* at 293-295, we find no error with regard to this ruling.

We conclude that the trial court did err, however, in its analysis of plaintiff's prescriptive easement argument. "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Center Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). In determining that a prescriptive easement did not exist in this case, the trial court stated:

> In her testimony, Donna Chartrand attempted to make the case that she had attained vested rights to maintain and use the dock because it had been there for so long. She is right on the facts, but incorrect on the law. Permissive use of property, regardless of the length of use, cannot ripen into a prescriptive easement. Rather, for a prescriptive easement, "[t]he use must be exclusive, not in the sense that it is used only by the person claiming the prescriptive easement, but in the sense that it does not depend upon a like right by others[,]" Cameron, *Michigan Real Property Law*, Section 6.11, citing *Outhwaite v Foot*, 240 Mich 327; 215 NW 331 (1927). In other words, the mutuality of use must end, and an adverse and hostile claim must continue for the statutory period.
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> According to Jerry Brueck, at least six non-shoreline owners had docks and three still do. In addition, the Bruecks believed that this right rested upon the right of other lot owners to use the shoreline strip in accordance with the dedication. And, as noted earlier, the use of the docks was not, at least until the Bruecks consulted an attorney in 1998, a point of contention. Therefore, under these facts, Plaintiff has not established an easement by prescription. [Footnote and some citations omitted.]

While we find no clear error with regard to the trial court's factual findings as set forth in this excerpt, we do, upon our de novo review, see *Frericks, supra* at 583, find error with respect to the court's legal conclusions. The trial court essentially concluded that no adverse or "hostile" use existed in this case because defendants implicitly *allowed* plaintiff to maintain the dock. However, as noted in the trial court's factual findings, this "permission" occurred *because defendants believed that the plat dedication allowed plaintiff to maintain a dock.* As stated by this Court in *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 826; 346 NW2d 881 (1984):

> A prescriptive easement is founded on the supposition of a grant. It arises from an open, notorious, continuous, and adverse use across the land of another for a period of 15 years. *Outhwaite[, supra* at 331]; *Reed v Soltys*, 106 Mich App 341, 346; 308 NW2d 201 (1981). A use of land is adverse when made under a claim of right where no right exists. Thus, if a claimant has obtained a conveyance of an easement which is ineffective, his use of the subservient estate, made on the assumption that the conveyance was legally effective, is adverse and not made in

> subordination to the owner of the burdened estate. 3 Powell, Real Property, § 413, pp 34-109-34-100.

This general doctrine was reinforced somewhat by *Plymouth Canton, supra* at 683-684, in which the Court concluded that even though the defendants and their predecessors had permitted the plaintiffs to use some of their property, the plaintiffs nonetheless obtained a prescriptive easement because the "permission" had occurred under the defendants' mistaken belief that a written easement agreement allowed the plaintiff's use of the property.

Under these authorities, the unspoken "permission" defendants granted plaintiff to maintain the dock in this case did not negate the "hostility" element necessary for a prescriptive easement. As noted in *Plymouth Canton, supra* at 681, the term "hostile" as used in the law of adverse possession (and, by analogy, as used in the law of prescriptive easements) does not imply ill will. "Instead, 'hostile' merely means a use that is inconsistent with the rights of an owner." *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001). Here, although no ill will existed between the parties, plaintiff openly maintained the dock continuously for over fifteen years, even though the plat dedication gave her no actual right to do so.[1] Under these circumstances, she sufficiently established the elements of a prescriptive easement.[2]

This conclusion does not end the relevant inquiry, however. Indeed, defendant argued below and argues again on appeal that when plaintiff transferred her original property in the subdivision, the easement transferred with it. Because the trial court concluded that no prescriptive easement had been established, it never reached this issue. We therefore remand this case for a finding regarding whether plaintiff's easement was an easement in gross (an easement benefiting a particular person and not necessarily attached to a parcel of land) or an easement appurtenant (an easement created to benefit a parcel of land). See generally *Mumaugh v Diamond Lake Area Cable TV Co*, 183 Mich App 597, 607; 456 NW2d 425 (1990), *Lakeside Associates v Toski Sands*, 131 Mich App 292, 296; 346 NW2d 92 (1983), and *Evans v Holloway Sand & Gravel, Inc*, 106 Mich App 70, 78; 308 NW2d 440 (1981). If plaintiff possessed an easement in gross, she may maintain her dock; if she possessed an easement appurtenant, she may not (because it transferred with her sale of the property).

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[1] Regarding the dock, plaintiff testified that "I could do anything with it. It was – it was mine." She further testified that she believed she had control of the dock for whatever purposes she wanted.

[2] Plaintiff did not establish the elements of adverse possession – as opposed to a prescriptive easement – because she did not demonstrate exclusive use. See generally *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.[3]

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

[3] We note that because plaintiff does not argue the issue on appeal, we do not rule with regard to her claim, contained in the complaint, that defendants are obligated to fund the construction of a new dock.